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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-366

CATHERINE FISHER, et al.,
Petitioners,

v.

COPELAND REFRIGERATION CORPORATION,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO,

and

LOCAL 725, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

BRIEF FOR RESPONDENT COPELAND REFRIGERATION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent, Copeland Refrigeration Corporation ("Copeland"), opposes the granting of a writ of certiorari in this matter, for the grounds set forth in this brief.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Sixth Circuit (Petition Appendix, pp. 38-39) and the memorandum opinion and order of the United States Dis-

trict Court for the Southern District of Ohio, Western Division, (Petition Appendix, pp. 25-37) are neither officially nor unofficially reported at this time. The Court of Appeals affirmance of the District Court order is noted at 497 F.2d 923.

JURISDICTION

Copeland agrees that the jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

COUNTER-STATEMENT OF QUESTION PRESENTED

The first question presented on plaintiffs' petition relates solely to the two union respondents. We submit the second question presented, which does concern Copeland, might more accurately be stated as follows:

> Whether the Court of Appeals correctly applied the controlling standards of review in affirming a summary judgment that no genuine issue of material fact existed to support the existence of an enforceable contract in an action brought under Section 301 of the Labor Management Relations Act, as amended (29 U.S.C. § 185).

Copeland contends this question should be answered "Yes".

COUNTER-STATEMENT OF THE CASE

Petitioners ("plaintiffs") are former employees of Copeland. The production and maintenance employees of Copeland at its Sidney, Ohio plant are represented for purposes of collective bargaining by the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 725 (the "International" and "Local

725", collectively the "Union"). The Union was also named as a defendant in this action, and as a respondent in this proceeding. The employees represented by the Union included plaintiffs while they were employed by Copeland.

This action was originally brought in the United States District Court, Southern District of Ohio, Western Division, by plaintiffs. Plaintiffs alleged that they had been discharged by defendant Copeland in violation of the collective bargaining agreement which they claimed was in effect at the time of their discharges in February, 1970. Plaintiffs further alleged that the Union had breached its statutory duty fairly to represent plaintiffs in contesting the discharges.

Copeland and Local 725 were parties to a collective bargaining agreement ("Agreement") which by its terms was effective from June 1, 1966 through June 1, 1969. This Agreement was one of a series of successive agreements between Copeland and Local 725. The Agreement provided that it could be terminated by written notice served by either party at least sixty days prior to its expiration date.

In a letter dated March 24, 1969, Nick York, President of Local 725, notified Copeland that Local 725 was terminating the 1966-1969 Agreement and that Local 725 desired to enter into negotiations with Copeland for a replacement agreement. On the same date, York also notified the Federal Mediation and Conciliation Service that Local 725 was terminating the Agreement. In accordance with these notices of termination, the Agreement terminated and expired at 11:59 p.m., June 1, 1969.

Prior to the expiration of the Agreement, the International Union took control of the affairs of Local 725 by placing the Local under administratorship effective March 25, 1969. Copeland was notified on April 1, 1969 that

administratorship had been imposed by the International Union.

At the time the agreement expired on June 1, 1969, a rival labor organization, District 50, United Mine Workers, was actively attempting to displace Local 725 as collective bargaining representative for Copeland's employees. Following a bitter campaign, an election was held by the National Labor Relations Board (the "Board") on June 19, 1969, to let the employees choose between these two unions. The Union won the election. District 50 filed objections, however, which delayed certification of the Union for nearly one year. Finally, on May 28, 1970, the Board dismissed the District 50 objections and certified the Union as representative of Copeland's employees.

On June 2, 1970, Copeland and the Union executed a Memorandum of Agreement which reinstated the terms of the collective bargaining agreement which had expired on June 1, 1969. The administratorship was removed by the International Union on June 8, 1970, fourteen months after it had been imposed. Thereafter, Local 725 resumed control of its affairs.

During the one-year period when there was no collective bargaining agreement in effect, Copeland maintained the status quo with respect to terms and conditions of employment such as rates of pay, seniority, "fringe" benefits and the handling of employee complaints. However, contract provisions with respect to compulsory union membership and deduction of union dues from employees' paychecks ceased upon expiration of the Agreement on June 1, 1969.

On May 27, 1969, Frank J. Gleason, President of Copeland, issued a letter to all employees stating Copeland's intention to continue unchanged the terms and conditions of employment in spite of the contract expiration during the hiatus when no labor organization represented Cope-

land's hourly employees because of the rival representation claim of District 50. The intention of the Company in this regard, during the period of the pendency of District 50's objections, was reaffirmed by Gleason in a letter dated July 1, 1969, which stated that conditions would be maintained despite the absence of a new agreement to replace the expired agreement.

The plaintiffs were discharged in February, 1970 for their participation in a sit-down strike against Copeland. Following their discharge, plaintiffs filed charges with the Board alleging that they had been discharged because of their union activities on behalf of District 50.[1] In connection with the processing of those discharges, John Kaplan, Director of Industrial Relations for Copeland, gave an affidavit to the Board on April 7, 1970. In that affidavit, Kaplan stated that he understood that the "contract" would continue after its June, 1969 termination, but that the provisions with respect to compulsory union membership and deduction of union dues from employees' paychecks would cease to be effective.

The Board's General Counsel found no merit in the unfair labor practice charge filed by the plaintiffs, and refused to issue complaints, based on the fact that plaintiffs had engaged in an unprotected "sit-down" strike against Copeland. The Board did not find that the strike engaged in by plaintiffs against Copeland was a strike in breach of a contract although this legal position had been forwarded by Copeland attorney Arthur Donovan as an alternate defense.

Subsequent to the institution of this action by plaintiffs,

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[1] "Although our contract expires as of the end of May, we will continue to operate as we have in the past, with regards to pay, fringe benefits, seniority, working conditions, grievances, etc." (App., *Infra*, p. 55)

the Union filed a motion for summary judgment which was supported by Copeland. Copeland and the Union contended that since there was no collective bargaining agreement in effect at the time of plaintiffs' discharges, such discharges could not constitute a violation of any contractual rights of plaintiffs and that, therefore, defendants were entitled to judgment as a matter of law.

The affidavits of each and every Union officer and official who had direct or supervisory control over Union affairs during the hiatus established that the Union did not enter into any collective bargaining agreement or agree to extend any collective bargaining agreement, either orally or in writing, with Copeland during that period. These agents of the Union included the Administrator who had charge of the affairs of Local 725, the President of Local 725, the President of the District Council of the International Union, and the Secretary-Treasurer of the International Union. There was no contrary evidence in the record which would indicate that either Local 725 or the International Union ever considered itself to be a party to any collective bargaining agreement, either written or oral, between June 2, 1969 and June 2, 1970.

Copeland, through its attorney Donovan, had proposed by letter of May 20, 1969, when Local 725 was under administratorship, that the Agreement which was to expire on June 1, 1969 be extended indefinitely. However, David J. Fitzmaurice, Secretary-Treasurer of the International Union, to whom this proposal was addressed, refused to sign this proposed extension and informed Donovan that the Union would not agree to such an extension.

Therefore, based on uncontradicted evidence, the District Court concluded that no collective bargaining agreement was in effect at the time of plaintiffs' discharges in February, 1970. Thus, as a matter of law, plaintiffs could

not establish any right to recovery based on the alleged existence of contractual rights. Accordingly, the District Court granted summary judgment and dismissed plaintiffs' complaint.

On appeal to the United States Court of Appeals for the Sixth Circuit, the Court of Appeals affirmed the finding of the District Court.

ARGUMENT FOR DENYING A WRIT OF CERTIORARI

I. THE DETERMINATION ON SUMMARY JUDGMENT THAT NO CONTRACT EXISTED AND, THEREFORE, NO CAUSE OF ACTION WAS STATED UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT DOES NOT RAISE ISSUES OF SUBSTANTIAL IMPORT BEFORE THE COURT AS TO NATIONAL LABOR POLICY OR CIVIL PROCEDURE.

A. A determination as to the existence of an enforceable contract is fundamental to any cause of action under Section 301 of the Labor Management Relations Act.

Absent an enforceable collective bargaining agreement, a suit cannot be maintained under Section 301 of the Labor Management Relations Act. *Adams* v. *The Budd Company,* 349 F.2d 368 (3 Cir. 1965); *Baker* v. *Fleet Maintenance, Inc.,* 409 F.2d 551 (7 Cir. 1969); *Globe Seaways, Inc.* v. *National Marine Engineers Ben. Ass'n,* 451 F.2d 1159, 1163 (2 Cir. 1971).

Plaintiffs contend that they have enforceable contractual rights under Section 301 by virtue of an alleged oral

extension of the collective bargaining agreement between the Company and the Union which expired as of June 1, 1969. In the alternative, plaintiffs argue that the expired agreement continued by implication or by estoppel. While the plaintiffs advance various contentions and arguments to support their position that a contract was in effect at the time of their discharge, the District Court concluded that the uncontradicted evidence established that no collective bargaining agreement was in effect at the time that plaintiffs were terminated by Copeland. The Court of Appeals affirmed this conclusion in all respects.

The District Court, in finding no contract, rejected the same theories and arguments that are now being advanced by the plaintiffs to this Court. The question before the District Court on summary judgment was whether a contract existed. It was within the province of the District Court to grant summary judgment where the undisputed evidence established that no collective bargaining agreement existed at the time of plaintiffs' termination. Other courts have acknowledged the propriety of summary judgment in these circumstances. *Baker* v. *Fleet Maintenance, Inc., supra; Lear Siegler, Inc.* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.,* 287 F. Supp. 692 (W.D. Mich. 1968). Moreover, courts have rejected the theories advanced by plaintiffs as to the existence of a contract by implication or estoppel. *Baker* v. *Fleet Maintenance, Inc., supra; Procter & Gamble Independent Union, etc.* v. *Procter & Gamble Mfg. Co.,* 312 F.2d 181 (2 Cir. 1962), cert. den., 374 U.S. 830 (1963); *A. S. Abell Company* v. *Baltimore Typographical Union No. 12, et al.,* 85 LRRM 2368 (D.C. Md. 1974); *Food Handlers, etc.* v. *Arkansas Poultry Co-op, Inc.,* 199 F. Supp. 895 (W.D. Ark. 1961).

The issue presented to the Court by this writ is, therefore, neither novel nor unique to questions raised in suits involving Section 301.

A determination as to the existence of a contract is essential to any action of this nature. While facts and circumstances may vary results in determining the existence of a contract under the accepted principles in Section 301 cases, the facts before the Court in this case do not present substantive issues of contractual law that are of importance to national labor policy. Rather, under the facts, plaintiffs seek to overturn established national labor policy as to both the representation rights of employees and the contractual relationship between employers and unions.

1. The undisputed evidence disclosed that no agreement, either oral or written, existed between Copeland and the Union at the time of plaintiffs' discharges.

The formation and existence of a collective bargaining agreement ordinarily consists of the normal contract rules of offer, acceptance, and intent. *See, Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 513 (1962). The District Court, in granting summary judgment to the defendants, considered affidavits of each and every Union official and officer having responsibility for the affairs of the Union during the period from March 24, 1969 – when the Union gave notice to terminate the contract – until June 2, 1970 – when the Company and the Union agreed in writing to reinstate the Agreement. Each of these affidavits unequivocally stated that no agreement of any sort was in

effect between Copeland and the Unions during that period. These affidavits are uncontradicted.

Although Copeland sought to extend the Agreement which was to expire on June 1, 1969, this proposal was rejected by the Union. At the time that the Company proposal was made, May 20, 1969, the Local 725 was in administratorship. It is undisputed that the International Union, through David J. Fitzmaurice, Secretary-Treasurer, refused to sign any extension and informed Copeland of the Union's refusal to enter in any agreement extending the contract.

Plaintiffs' argument that an oral agreement existed between the parties is not supported by the evidence and there is no genuine factual issue as to such an oral agreement.[2] Again, the uncontradicted evidence established that the Union had never agreed to any extension, either oral or written, of the contract. In this connection, when the parties did in fact reinstate the terms of the expired agreement in June, 1970, they did so pursuant to a written agreement, executed immediately after the Union was certified by the National Labor Relations Board on May 28, 1970.

Nor is plaintiffs' reliance on Kaplan's affidavit well-founded. The same affidavit makes it clear that Kaplan was mistakenly refering to the proposed letter-extension which the Union had rejected unsigned, and that, significantly,

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[2] The District Court found that the termination letter of March 24, 1969, from Local 725 President York to Copeland was effective to terminate the Agreement in accordance with its terms on June 1, 1969. Plaintiffs, in their petition, do not contest the effectiveness of this termination letter to accomplish that purpose. Therefore, absent subsequent action by Copeland and the Union, the Agreement ceased to be effective as of June 1, 1969. *Paterson Parchment Paper Co.* v. *International Brotherhood of Papermakers*, 191 F.2d 252 (3 Cir. 1951), cert. den. 342 U.S. 933 (1952).

the union shop and dues check-off were not extended. (App., *Infra*, p. 102) In sharp and revealing contrast are the letters from Copeland's President Gleason of May 27 and July 1 (App. Infra pp. 55 and 56) in which on both those *highly significant dates, all employees were informed that* the contract expired as of the end of May, but that the working conditions, including grievances, would continue unchanged during the contract hiatus. And of course the contentions of Copeland's attorney, Donovan, before the Board are no evidence at all. "Statements of legal theory advanced by the Company in processing grievances or in resisting unfair labor practice charges before the NLRB are not binding on the Company or this Court where the facts disclose that a Collective Bargaining Agreement was not in existence at the time of the plaintiffs' discharge." (Petition App. p. 31)

Accordingly, based on the foregoing, the District Court properly found, "The undisputed evidence disclosed that no oral agreement extending the duration of the 1966 to 1969 bargaining agreement was entered into by the parties."

2. The plaintiffs alternate assertions that a contract existed by implication or by estoppel are unsupported by fact and law.

In the alternative, plaintiffs contend that an implied contract could be found to exist between Copeland and the Union by the conduct and representations of the Company and the Union. Plaintiffs' attempt to support this argument by the fact that wages, fringe benefits, the grievance procedure and other conditions of employment were maintained by Copeland following the termination of the Agreement. The assertion that a contract existed by implica-

tion, based on the foregoing, is both factually and legally unsupportable.

The maintenance of the status quo of these conditions of employment following termination of the Agreement was not optional with Copeland. Rather, the duty to bargain established by Section 8 (a) (5) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 *et seq.* (the "Act"), prohibits an employer from making unilateral changes in terms and conditions of employment prior to bargaining with the union. *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962).[3] The fact that the prior collective bargaining agreement has been terminated, as in this instance, does not alter the conclusion that such unilateral action by an employer is unlawful. Thus, the alteration of grievance procedures and modification of seniority rights, even after an agreement has expired, constitutes a refusal to bargain when unilaterally undertaken by an employer. *Industrial Union of Marine and Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (3 Cir. 1963), cert. den. 315 U.S. 984 (1964).

Copeland could not bargain with the Union as to changes, or make unilateral changes in conditions, for it was faced with a rival representation claim. In such circumstances, Copeland was prohibited from bargaining with either of the rival unions until the question of representation was resolved by the National Labor Relations Board. "Employers who have entered a collective bargaining agreement with a union when a real question as to representation existed have been held responsible for committing an unfair

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[3] Whether the duty of the Company arises under Section 8(a)(5) by reason of the *Katz* case or under Section 8(a)(1) of the Act (see, e.g., decision of this Court in *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405 (1964)), it is clear that the Company was compelled to refrain from making unilateral changes in wages and working conditions during the pendency of the rival-union representation question.

labor practice [citation omitted]." *N.L.R.B.* v. *Signal Oil and Gas Co.*, 303 F.2d 785, 787 (5 Cir. 1962).

Plaintiffs' claim that unilateral changes could be made without violating the Act because bargaining was not in progress is, therefore, not supported by the cases referenced. (Petition, fn. 8, pp. 18-19). Rather, the law requires Copeland to remain neutral and not alter existing terms and conditions of employment. *Midwest Piping & Supply, Inc.*, 63 NLRB 1060 (1945).

Therefore, Copeland had no choice but to continue unchanged the terms and conditions of employment as they existed under the expired agreement. Certainly, the fact that Copeland followed this legally compelled course of action cannot be viewed as evidence that any agreement to do so was in effect. *Baker* v. *Fleet Maintenance, Inc., supra; Procter & Gamble Independent Union* v. *Procter and Gamble, supra; A. S. Abell Company* v. *Baltimore Typographical Union No. 12, et al., supra.*

Copeland's acknowledgement of these principles of law and of its intention to comply with them by its letters to employees, even though the contract between Copeland and the Union had terminated, cannot be construed as an implied obligation to continue the contract in effect.

Not all the terms and conditions of employment must be continued by the employer absent bargaining with the Union when the agreement expires. Union security and dues check-off are matters of contract and, therefore, do not survive the termination of an agreement. *Industrial Union of Marine and Shipbuilding Workers* v. *N.L.R.B., supra* at 610; *Bethlehem Steel Company,* 136 NLRB 1500 (1962). Copeland's status quo position is further fortified by the fact that the undisputed evidence showed that neither the union security clause nor the dues check-off clause continued beyond the expiration date of the Agreement.

The conduct of the parties provides no basis for any inference that an implied contract existed in this case. The maintenance of the "status quo" between agreements is not unusual. *Procter and Gamble Independent Union, etc.* v. *The Procter and Gamble Mfg. Co., supra* at p. 184.

Plaintiffs further assert that a contract implied in law should be found to exist based upon *John Wiley and Sons* v. *Livingston*, 376 U.S. 543 (1964). In the *Wiley* case, the Court put a successor employer in the position of the original employer, requiring that the successor employer arbitrate matters which arose under the original employer's contract. The holding of *Wiley* was "properly cautious and narrow". *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, etc.*, — U.S. —, 41 L.Ed.2d 46, 94 S.Ct. — (June 3, 1974). Here, plaintiffs seek to extend the consensual relationship between the parties after it had expired. Such an extension would contradict the fundamental principles of Section 301, of encouraging voluntary agreement and then enforcing that agreement. When parties agree to a termination date – a significant element to both employer and union – that agreement too, should be carried out.[4]

Therefore, an implied contract cannot under these circumstances be found to exist.

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[4] A "fundamental premise" of federal labor policy is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract". *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, etc., supra*, at p. 52; *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 287 (1972); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 108 (1970). Even in *Wiley* the Court would not force upon the parties "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved", 376 U.S. at page 551.

II. THE COURTS BELOW DID NOT ABUSE THEIR AUTHORITY OR ACT ERRONEOUSLY IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Court of Appeals, in reviewing the District Court's memorandum opinion and order, obviously considered the propriety of the District Court's action in granting summary judgment. It affirmed the District Court's granting of summary judgment upon the District Court's opinion, and thus for the reason that the undisputed evidence demonstrated that no contract existed at the time of plaintiffs' termination. Plaintiffs seek to resist uncontroverted facts by rationale and arguments which are not supported by law. Plaintiffs have sought to establish a contract in the face of facts leading solely to the conclusion that no contract existed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied. In summary, plaintiffs present only an argument supporting a case which they urge has been wrongly decided. The courts below have not created any conflict with the rulings of other courts, nor have they infringed any principles of national labor policy. The question before the lower courts was simply whether or not there was sufficient evidence to support a genuine claim that a contract existed. The courts below found the undisputed evidence to be that no contract existed at the time of plaintiffs' discharge. Accordingly, no cause of action

existed under Section 301 and summary judgment was properly granted.

Respectfully submitted,

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